From: Charles Cheatham <charles@oba.com> on 01/27/2004 06:20:21 PM
Subject: Equal Credit Opportunity

These comments are respectfully submitted concerning the Federal Reserve's proposed changes to the various consumer regulations (B, E, M, Z and DD) listed above. Specifically, I am concerned about the "reasonably understandable language" test that you propose to add to these various regulations as one element of what constitutes an element of a "clear and conspicuous" disclosure. I believe this specific aspect of the proposal is a potential disaster in the making, and should be eliminated. Adding the "reasonably understandable language" test may be very well-intentioned, but is impractical, unrealistic, and probably unattainable on any consistent basis beyond a certain point. This proposed test creates a potential litigation bonanza for plaintiffs' lawyers.

At the same time, I'm not sure a revised regulation would result in consumers actually taking the time to read and understand the "clearer" disclosures that are given. (It is not possible to require consumers to be interested in the subject, no matter how clear the disclosures. Required notices and disclosures have already reached the point that their length makes them counterproductive. We instead need regulations to require notices with a shorter list of disclosures, if there is to be any hope of consumers actually reading what is provided.) The potential risks and burdens for lenders in a "reasonably understandable language" test almost certainly outweigh the potential benefit for consumers. (And contrary to what might be one's first thought, a requirement for "simpler" language invariably lengthens the disclosure, rather than shortening it. It almost always takes more words in "simple English" to get to the same legal meaning that can be achieved more compactly by use of technical terms. Simple English is looser and more variable in its meaning. By being less precise it requires more qualifying words and explanations to get to the same content that a technical term has.)

My background includes considerable experience in translating certain phrases and concepts into different phrases that hopefully have both the same literal meaning and the same connotations as the original. I am familiar not only with translating from one language to another, but also with translating from technical language to "plain English." The process for both is very similar in what it requires. I would strongly resist the notion that translating into simple English can be accomplished unless a person has certain above-average language skills, patience, time, and good attention to detail, as well as insight into the level of understanding that one's audience will have. I have taught dozens of composition classes and "scientific and technical report writing" classes, and I can say with certainty that the process of learning to write simply, clearly, and concretely, while avoiding technical words, is a lengthy, hard-fought battle, and has far more casualties than conquerors. Many do not choose to wage this battle at all. Passing a regulation will not give anyone the necessary skills.

Law schools do not teach their graduates to write according to the "reasonably understandable" guideline which you suggest. Business schools also do not teach their MBA's to write this way. (I suspect Federal regulatory agencies do not provide any of that type of training to their employees, either. Nor do supervisors of legislative staffs.) What is an ordinary bank employee to do, who may have only a high school degree or a few years of college? How can you reasonably impose a standard unless the competency to accomplish it is readily available, and at a reasonable cost?

I don't think even the Federal Reserve staff could pass its own required test of using "definite, concrete, everyday words" while avoiding "legal and highly technical business terminology" as required in the proposed Staff Interpretation to Regulation Z at Section 226.2(a)(27). A quick skimming through Regulation Z itself, which is just one of the consumer regulations under review, provides many examples of what I mean. The average person could easily go from infancy to college graduation without ever using in a conversation the following example words that I have taken from Regulation Z (at least not with the meaning that the words have in the regulation), and surely it cannot be said in any real sense that these words are "reasonably understandable" to the average non-financial person, who could not define or even spell most of them:

--rescission, closed-end credit, open-end credit, consummation, consensual, accessions, solicitation, misrepresentation, clarification, delinquency, eligibility, transmittal, notification, constitutionally available, resolution [resolving], reassertion, occurrence, conspicuously, impracticable, inequitable, tender [offering something to someone], amortization, actuarial, tolerance, preempted, subordinate, differential, itemization, pertinent, appreciation, assignee

Ordinary people do not use these words. No way.

A person who translates from a technical vocabulary to a common vocabulary must be equally versed in financial language and non-financial language, to do it well, and still it's a struggle. Such a person must have an "ear" for what the non-financial person would understand; yet, many times, a person who has become accustomed to financial terms no longer even recognizes them as being technical jargon or something that an ordinary hearer would not understand. This could lead to oversight of certain words, and errors of judgment as to what is understandable, in spite of a person's best intentions. How many people must check over and recheck the "translation"? How many "typical" consumers must be shown the "simple" language before a bank can develop any confidence that it is finally right? Where is the safe harbor even after doing this much, if another group of consumers comes along and says they can't understand the meaning?

In every field there are technical terms--simply because common, conversational words are not adequate for the purpose, or because common words have varying or imprecise meanings to different people. Technical words allow communication to be specific and concise, so that everyone within a certain subject matter can instantly "get on the same page." "Terms of art" in every field have a readily accepted meaning, which (for example, in the context of contracts, such as deposit agreements and loan documents) is a very good thing. Certainty of interpretation means certainty of outcome in a transaction, and avoids legal actions. "Substitute words" that a person comes up with to meet a "simple English" test do not start out by having the same acceptance or definiteness in court cases. Whether "substitute words" will result in the same legal outcome as "tried and true" technical terms can only be determined after court cases test the substitute terminology. The Federal Reserve in effect would be inviting banks to incur litigation risk, by forcing the use of untested simple language of their own making, instead of standard technical language.

To attack the outcome (bad writing, or terms difficult to understand) is not the same as addressing the cause of the problem. Writing competency in the public schools is declining at a frightening rate. Most young people, living in an Internet world, shun books altogether, avoid writing whenever possible, and believe that creating anything approaching a long memo would be extremely distasteful, if not downright torture. A Reg Z or Reg DD disclosure is similar in length to a long memo, and telling someone to translate such a document into plain English would leave most people in absolute panic. In effect, this regulation mandates that a person must have a strong command of the English language and grammar, and patience, and great attention to detail, as well as a work ethic for excellence. This cannot be created by regulation.

I would suggest that there are other steps that the Federal Reserve could, and should, undertake first, instead of starting by requiring banks to make disclosures in simple English. First, the Federal Reserve should lead by example, getting the technical jargon out of its own regulations (and statutes). If Reg Z talks about a "right of rescission," it surely can be no surprise that a notice or disclosure that is drafted with a sincere desire to comply with the regulation will mirror the same "right of rescission" language. About 98% of the population couldn't even spell "rescission" if their lives depended on it. A word such as this has no meaning at all to the average person. It might as well be Greek. How can a bank be expected to use a "plain-language heading," as the Federal Reserve's proposal suggests, if Regulation Z requires a bank to give a right of rescission? Must a bank wallow around in some kind of "plain-English" equivalent, hoping it gets it right, without actually being able to use the words (which might be too "technical")? On some level this is not unlike a game of charades, where we must try to communicate imperfectly with hand signals because the ability to use the correct, precise words is denied to us.

Second, I think the Federal Reserve would do well to develop a "lexicon" of substitute words and phrases

that will be considered to adequately convey the same meaning as the more generally accepted financial terminology that the Federal Reserve prefers banks to avoid. If these words and phrases were provided to banks (instead of making banks guess at what is appropriate to convey the meaning), there would be a "safe harbor" legally. This would encourage banks voluntarily to move in the direction of simpler English.

Third, along the same line, the Federal Reserve should develop entire sample disclosures in plain English, that are adequate but not mandatory. If you want plain English, show them what you would accept, don't just tell them. Give them sample language that will satisfy you, instead of making thousands of banks each make wasted and duplicative efforts at trying to guess what language would be adequate.

Fourth, it would be ideal if the Federal Reserve could work with law schools and business schools (and those who train other types of financial service professionals) to try to encourage a curriculum that emphasizes "plain-English" writing and the avoidance of Latinate words, excessive technical jargon, etc. The hand-in-glove complement to this would have to be a deliberate teaching of more "plain English" terminology in professional training programs, in explaining financial products. (If people are neither trained, nor given examples, nor given incentive, to learn to write in a more simple, straight-forward manner, how can any regulatory mandate accomplish this result?)

Fifth, a much more aggressive program to encourage the teaching of financial literacy in the public schools, strongly encouraged by the Federal Reserve, might be more beneficial than anything, by moving the average consumer closer to the industry in terms of the consumer's ability to understand financial terms and disclosures. (It is not ultimately possible to "dumb down" everything in the finance industry to a fifth-grade level, without eventually turning everything into "mush." The level of consumer understanding needs to be raised above what currently exists, to meet the industry half-way.) Financial matters are not an unimportant subject to anyone, and it would be very helpful, not harmful, to give the consumer greater education and greater ability to comprehend financial concepts.

The major, unavoidable, bottom-line problem with requiring a "reasonably understandable" standard for bank disclosures is that all concepts of "understandable" are relative to the background of the person who is trying to understand. A person's ability to comprehend certain terms varies widely, depending on his family, culture, ethnicity, geographical region, occupation, level of education, interests, breadth of vocabulary, etc. It would be a nightmare if a bank in some part of the country was sued for not providing "reasonably understandable" disclosures and the decision on whether the disclosure was adequate would rest on the impression of the jury in the particular locality that, to them, the words do not have reasonably understandable meaning, although in another area of the country the same terminology might be adequate. As I am suggesting, a "reasonably understandable" test is so nebulous that it will create almost intolerable uncertainty, and endless second-guessing, as to what is adequate-unless, of course, sample "adequate" disclosures are provided. It would cause an incredible amount of wasted effort by banks, to worry endlessly over whether every word is "definite, concrete and everyday" and not "legal or highly technical business terminology." And every examiner who walks into a bank might have his/her own subjective idea of what these phrases mean.

In assessing the "economic impact" for this portion of your proposed amendments to the consumer regulations, I would strongly emphasize that the cost will be very high for complying with "plain language" requirements-and the burden will fall disproportionately on smaller banks, which may have as many types of forms as large banks do, although they will use them less often, with the result that they will have less volume over which to spread the increased costs. Small-to-medium-size banks may have no one on at all on their staff who has both the technical skill and the language skills to accurately gauge the ordinary consumer's normal vocabulary level, while also being able to accurately translate the technical terms into common terms that will stand up in court as having the exact-same intended legal meaning. In short, big banks will find a way to do it, but small banks will suffer.

Although I do not expect that you will particularly like these comments, they are sincere. I do thank you for the opportunity to express my opinions.

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